OMNIBUS AND NATIONAL DEFENSE AUTHORIZATION ACT

Madam President, now on the omni and the NDAA, as we approach the end of the year, two of the most important priorities the Senate must focus on are passing a yearlong omnibus and approving a bipartisan Defense appropriations bill.

We have a lot of work left to do on both fronts, but so far, I am encouraged by the goodwill coming from both sides. While Democrats and Republicans disagree on the details of the omnibus, there is little debate that a CR would be terrible news for our troops and for American security.

Yesterday, I attended a classified briefing on the latest developments in the war in Ukraine. Without getting into any of the details disclosed there, it was obvious, sitting in the room, that much of Ukraine's success is thanks to the emergency military and economic aid provided by the United States. Ten months into this war, there is no question, in my judgment, that helping our Ukrainian friends has been the right thing to do.

But the fighting in Eastern Europe is sadly far from over. Putin's human rights atrocities continue. He is a vicious and brutal dictator. News reports come in daily of mass graves, civilian casualties. Entire cities—men, women, children—civilians, being killed and maimed and entire cities being reduced to rubble. Yet even now, the brave and strong people of Ukraine have endured and fought back. They know what Russian aggression is. They remember it from the days of the 1930s when Stalin sought to starve a huge number of Ukrainians to death.

The United States must stay the course helping our friends in need. And by the way, this is not just a matter of standing with Ukraine; it is a matter of American security because, deep down, Putin is nothing more than a violent bully who will endanger our own democracy if his influence is allowed to expand, and he will not stop at Ukraine if he succeeds there.

The single worst thing we can do right now is give Putin any signal that we are wavering in our commitment to help Ukraine. That is precisely what a CR would signal, and we cannot afford to go down that treacherous road. So I hope both sides will work together. We are making good progress. Paper is now being exchanged back and forth. We are not there yet. We have got a ways to go, but we have got to keep working until we get an omnibus done, for the sake of our national security.

Meanwhile, at the same time, both parties must cooperate on passing a bipartisan national defense act, as we have done now for more than six decades. Just as we need to hold the line against Putin and his belligerence, we also have to stand firm against encroachments and aggression from the Chinese Communist Party.

A few months ago, the Senate took a major step in that direction by passing the CHIPS and Science Act, which will boost domestic chip manufacturing and help sever our dependence on foreign-made semiconductors. But just because we passed CHIPS and Science doesn't mean the job is done. We need to build on our accomplishments by adding even more protections in the NDAA so we can continue reducing U.S. reliance on risky, Chinese-made microchips.

So, last month, I joined with Senator CORNYN, my colleague from Texas, to introduce an amendment to the NDAA that would prohibit the U.S. Government from doing business with companies that rely on certain Chinese chipmakers that the Pentagon has labeled ''Chinese military contractors.'' This amendment would address a very big problem: Too many American companies with Federal contracts are purchasing chips made by Chinese makers with well-known ties to the Chinese Communist Party and the Chinese Government. You don't need to be a national security expert to see how this dependence on Chinese chips presents a serious risk to Americans' cyber security, to our privacy, to our defense.

The previous administration—one of the few areas they went forward on that I agreed with—got rid of Huawei because it gave the Chinese Government and the Chinese Communist Party too much influence. Well, the same thing will happen with these chipmakers, these Chinese military contractor chipmakers, if they are allowed to continue to infuse their chips in our own equipment.

Now, our amendment would remedy this with a simple proposition: If American businesses want to do business with the Federal Government, they shouldn't be allowed to turn around and then do business with risky Chinese chipmakers. We certainly need and give ample time for American companies to adjust and get American-made chips or non-Chinese-made chips, non-Chinese-military-contractor-made chips, but it must be done. This is national security, once again, as well as economic security and the idea of keeping America No. 1, which we took a big step forward on with the CHIPS Act, but there is more that has to be done.

So this proposal is one of many sound proposals that I hope to see included in the NDAA. I am, of course, fighting for a whole bunch of other things. On this issue, I thank Senator CORNYN for working with me on the amendment, and very soon the Senate hopefully will take quick action to send a defense authorization bill to the President's desk.

I yield the floor.

I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The senior assistant legislative clerk proceeded to call the roll.

Mr. MCCONNELL. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

RECOGNITION OF THE MINORITY LEADER

The Republican leader is recognized.

THE JUDICIARY

Mr. MCCONNELL. Madam President, it has been one of the big, unfortunate ironies of the past several years: Many of the same individuals and institutions on the political left that have spent the years 2017 through 2020 yelling about the importance of norms and institutions have themselves not hesitated to undermine our institutions when they are unhappy with a given outcome.

Just as an example, the newly elected incoming leader of the House Democrats is a past election denier who baselessly said the 2016 election was ''illegitimate'' and suggested that we had a ''fake'' President. He has also mounted reckless attacks on our independent judiciary and said that Justices he didn't like have ''zero legitimacy.''

Unfortunately, when it comes to attacking our independent judiciary, the Democrats' new leader isn't an outlier; he is a representative sample. In the last few years, we have seen my counterpart, the Senate Democratic leader, threaten sitting Justices by name over on the Supreme Court steps; we have seen President Biden and Attorney General Garland refuse to enforce Federal law and put a stop to illegal harassment campaigns at the homes of Justices; and we have seen coordinated efforts by Democrats and the media to use smear campaigns to personally punish Justices whose legal reasoning they don't like.

The latest target has been Justice Alito, whose great offense was overruling a deeply flawed precedent that prominent liberal legal scholars, including even the late Justice Ginsburg herself, long acknowledged was badly written and poorly reasoned.

I am confident the smear campaigns and baseless fishing expeditions will keep groping around, and I am just as confident that Justices Alito, Thomas, and the entire Court will continue to ignore the noise and the smears and practice judicial independence.

We also see growing evidence that the attacks on members of the legal profession who dare to upset the activist left are actually not limited to judges and other public officials. Private citizens are not safe. Earlier this week, a longtime female partner at a major law firm explained in an op-ed how she was forced out of the firm after she dared—dared—to enter into a ''safe space for women'' and share her own personal views on the Dobbs ruling. As she tells it, simply being a woman who agreed with the five-Justice majority of the Supreme Court was a fireable offense. Some of her colleagues claimed that merely hearing her express a dissenting view caused them to ''[lose] their ability to breathe.''

This past summer, two wildly successful appellate litigators, including a former U.S. Solicitor General, were

drummed out of another prominent firm because they won a Supreme Court victory for the Second Amendment. In their telling, they were basically told to either abandon their pro-Second Amendment clients or hand in their badges.

Meanwhile, intellectual freedom and the competition of ideas have also been slipping away in the legal academy. Multiple circuit judges are so disturbed by the anti-free speech trends in elite law schools that they are starting to decline to hire clerks from otherwise prestigious schools that are hostile to nonliberal views.

Just last night, two such judges participated in a Yale Law School panel titled—listen to this—''Is Free Speech Dead on Campus?'' ''Is Free Speech Dead on Campus?''

And of course, the left's rapidly growing appetite for censorship is not limited to the legal realm. Earlier this week, in a truly bizarre and disturbing moment, the White House Press Secretary said the Biden administration is—listen to this—''keeping an eye on'' the social media company Twitter, which was recently purchased by an owner who doesn't happen to be a liberal.

The antidote to all this toxic nonsense is renewed appreciation for the deeply American principle of free speech and open debate. No one in my lifetime has understood the importance of free speech and the competition of ideas better than the recently departed Judge Laurence Silberman. Larry was a legal genius and a patriot, whose rich and varied career culminated on the DC Circuit, where many came to view him as the single most important jurist in American history who never sat on the Supreme Court.

The last major address Judge Silberman gave before his death was a powerful and important speech on free speech, which he delivered at Dartmouth in September. He explained how un-American and dangerous it is to enter an era where ''some political speech is attacked as if it were blasphemy drawn from the colonial period when witches were burned at the stake.''

I will have more to say on this subject soon. But for now, I ask unanimous consent to have printed in the RECORD the published text of Judge Silberman's final speech, in full, at the conclusion of my remarks.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From Dartmouth University, Sept. 20, 2022]

FREE SPEECH IS THE MOST FUNDAMENTAL AMERICAN VALUE

(By Laurence H. Silberman)

This is a Constitution Day talk. So I will address one of today's most contentious constitutional subjects—the First Amendment's protection of free speech. As I noted in a recent opinion, the First Amendment's guarantee of free speech is not just a legal doctrine. It represents the most fundamental value in American democracy. A national commitment to uninhibited political speech is a crucial aspect of our country's culture. It is the penumbra around the First Amendment, which, by itself, only prohibits government control of speech. Unless all American institutions are committed to free political speech, I fear the strain on the First Amendment's guarantees will become unbearable.

Those seeking to suppress free speech sometimes think that provocative, even extreme and obnoxious, political speech is dangerously divisive. It should be suppressed. I think that is profoundly wrong. I think it is the very opposite. Toleration of all versions of political speech is the crucial unifying factor in our country.

Some years ago, I was ambassador to Yugoslavia, a communist country where freedom of political speech did not exist. I had a small fund with which I could send promising young intellectuals to the United States in the summer. Yugoslavia, then a country of six separate ethnicities, was threatened by centrifugal ethnic forces (which ultimately resulted in six separate nationalities). The government sought to squelch talk that threatened Yugoslav unity.

One intellectual that I sent to the United States came back and expressed wonderment that our country—composed as it is of the descendants of an enormous number of nationalities—could nevertheless enjoy such a uniform commitment to shared values. I explained that we swore allegiance not to a sovereign nor a blood grouping, but rather to a legal document—the Constitution. And nothing in that legal document was more important than the First Amendment. Protection of the speech of fellow Americans, even the most provocative and unpleasant, reflects a fundamental tolerance for all Americans.

I was often obliged to explain the First Amendment to the Yugoslavs who demanded that I restrain the New York Times's criticism of their government. Their eyes would glaze over during my First Amendment lectures; they didn't believe me until I pointed out that if our government could influence the New York Times a Republican administration would have every incentive to do so. That finally got across. Interestingly, even allied democratic governments that generally—but only generally—supported free speech were mystified by the strength of our First Amendment.

To be sure, I recently wrote an opinion seeking the overturning of New York Times v. Sullivan, a case that benefits the press. That case, by constitutionalizing American libel law, made it nearly impossible to sue media for certain inaccurate personal attacks on public figures. Some have suggested my position reflects less than vigorous support for the First Amendment. On the contrary, I oppose New York Times v. Sullivan because it was wholly illegitimate policy making by the Supreme Court.

A guarantee of free press does not mean special immunization from accountability when the press libels a person. A free press is not necessarily an all-powerful press. The Supreme Court in Sullivan was concerned, legitimately, about problems created by excessive libel actions against newspapers supporting the struggle for civil rights, but that could have been handled with legislation. It was illegitimate for the Supreme Court to literally make up constitutional law to deal with the problem. Its decision was contrary to text and history, and it created new problems for society in the form of media that can spread false rumors and sling unfounded accusations directed at public figures without consequence.

The history of the First Amendment is fascinating. The phrase ''freedom of speech'' first appeared in the Anglo-American tradition in the English Bill of Rights written in 1689. It only protected the expression of members of Parliament. This was so because, in the English tradition, Parliament, not the general population, was the source of sovereignty. Our Founders extended that right to all citizens, because here the people rule as sovereign.

As many of you know, the First Amendment was drafted by one of the most extraordinary of our original political leaders—James Madison. His primary focus was freedom of the press, which was included in the constitutions of virtually all the colonies; whereas the phrase ''freedom of speech'' only existed in one of those. But if one thinks about it, which clearly Madison did, freedom of speech was a necessary corollary of freedom of the press. It followed apodictically, if you protect words that appear in the press, you couldn't suppress those words uttered verbally.

There are virtually no cases in the first half of the 19th century involving the First Amendment's freedom of speech. As you might know, the First Amendment did not apply to the states until after the Civil War, when the 14th amendment's Due Process Clause was seen to incorporate the First Amendment.

The first case that I could find considering the First Amendment's free speech clause as applied to the states was Patterson v. Colorado in 1907. It included a dissent by one of our greatest justices, John Marshall Harlan. He was the man who dissented in Plessy v. Ferguson from the odious view that racial segregation, although separate could nevertheless be equal.

Patterson involved a state judge who held a litigant in contempt for criticizing the judge's opinion. The majority upheld the contempt finding. Harlan disagreed. He said: ''I cannot assent to that view if it be meant that the legislature may impair or abridge the rights of a free press and of free speech whenever it thinks that the public welfare requires that to be done. The public welfare cannot override constitutional privileges.'' He concluded that ''the privileges of free speech and of a free press—belonging to every citizen of the United States—constitute essential parts of every man's liberty.''

Not surprisingly, the constitutional protection of free speech from government action has been most strained when we faced national security threats. First were the notorious Alien and Sedition acts growing out of the three-corner tension between the United States, Great Britain, and France. But the statutes were abandoned before the Supreme Court had an opportunity to rule on them.

Perhaps most astonishing is the degree of Lincoln's tolerance of free speech even during the bloody Civil War. He did strain the First Amendment on occasion, but given the threat to the nation, it is amazing how tolerant Lincoln was of fierce criticism. For instance, he announced that the arrest of Vallandingham, a southern sympathizer, was wrong if that arrest was based purely on Vallandingham's criticism of Lincoln. In instructions to his general in dealing with Northern civilians aiding Confederate guerrillas, Lincoln explicitly directed Gen. Ewing to only arrest individuals or suppress assemblies or newspapers if they were working ''palpable injury to the Military'' and that ''in no other case will you interfere with the expression of opinion in any form.''

Then, we have the 20th century's wartime pressures on the First Amendment. Some of the most celebrated First Amendment opinions, Abrams, Gitlow, Whitney were the result of challenges to laws passed to suppress wartime protests. Perhaps the most problematic was the McCarthy era, which my class

of 1957 experienced at the time we entered Dartmouth. The notorious senator from Wisconsin was able to intimidate politicians, academics and Hollywood writers in his wide-ranging and, in many cases, wholly unjustified pursuit of alleged communist sympathizers.

Turning to the present, I am convinced we are faced today with a worse threat to free speech than during that earlier time. Indeed, now some political speech is attacked as if it were blasphemy drawn from the colonial period when witches were burned at the stake. Threats against political speakers are not simply levied by unscrupulous politicians, they come also from young people influenced by academics—ironically the prime targets of the McCarthy era. Certain controversial subjects are placed out of bounds.

I am shocked at the recent challenges to free speech in our academic institutions—particularly the Ivy League. For example, recently at Yale Law School, students attempted to stop, then drown out, a public dialogue between a conservative and a liberal lawyer. They were both supporting untrammeled political speech. The administration's response was to vaguely gesture at the importance of free speech but also to celebrate ''respect and inclusion''—whatever that means. The dean sent a letter calling the behavior ''unacceptable,'' but she did not so much as issue a slap on the wrist to the students who were hostile to free speech.

And at Princeton, Prof. Joshua Katz was stripped of his tenure and fired after challenging the university's orthodox view on race. He was terminated ostensibly based on the disputed details of a consensual relationship he had with a student 15 years ago—for which he had already been disciplined. This was only after he criticized a Princeton faculty letter that demanded preferential treatment both for minority faculty and a black student organization. Does anyone believe that Katz would have been fired if instead he gave a speech in support of a black student organization?

Similarly, at Harvard, Prof. Roland Fryer, one of the most gifted economists in the country—who happens to be black—has been suspended for two years for allegations that he made inappropriate comments. His supposed crime was telling raunchy jokes. But Fryer's real crime was his work empirically demonstrating that police do not kill blacks at a higher rate than other races, and that black students excel when faced with high expectations—challenges to the current shibboleths on race.

Amy Wax, professor at Penn Law School, was recently punished because she unwisely—indeed somewhat cruelly—described her experience over many years regarding black student performance in her class. She therefore touched on the mismatch theory popularized by Richard Sander and Stuart Taylor. They wrote a book by that name and have filed an amicus brief in the Harvard case before the Supreme Court.

They contend that in an effort to achieve soft quotas, elite schools artificially admit less qualified minorities thereby injuring the very students supposedly benefitted. In other words, in a less competitive school those students might do much better. I emphasize that, as a judge, I take no position on the mismatch theory. But I predict you will see reference to it in the forthcoming Supreme Court opinion.

To be sure, it is unseemly for any serving professor to suggest that minority students are less qualified. (That proposition is more readily expressed openly by emeritus professors no longer teaching, like Alan Dershowitz at Harvard Law School and Stanley Goldfarb at Penn Medical School.) In furtherance of Amy Wax's tendency to offend minority groups, she recently attacked Asian-Americans in the most unflattering terms. I gagged when I read her remarks, but free speech is free speech.

Even Dartmouth, to my distress, has engaged in smothering provocative speech. In January, the college cancelled an event with Andy Ngo, a controversial conservative journalist. His speech was forced online based on unspecified information from the Hanover Police Department. Apparently, Dartmouth has been evasive about the ''credible threats'' it received. It has provided shifting rationales for its decision.

The College Republicans have also been charged $3,600 for an event which did not actually take place. Indeed, I think it is inappropriate for the college to ever charge organizations for the protection their speech requires. That policy simply accentuates the power of those who would discourage free speech.

If the Dartmouth administration had the backbone to discipline students who shouted down speakers or to arrest nonstudents for disrupting events, the deterrent effect would obviate the need for imposing security expenses.

Regardless of the situation, the college aligned itself with those who wish to silence speech by cancelling the event. It should be recalled that, in Terminiello, the Supreme Court squarely rejected the so-called heckler's-veto rationale for suppressing speech. The court held that speech cannot be punished merely because it could cause unrest amongst potential listeners.

A common thread of these incidents at Yale, Princeton, Harvard, U Penn and Dartmouth is that university authorities, in discouraging unfashionable speech, do not do so explicitly. Rather, they perform an ''Ivy League Two Step.'' First, they pay lip service towards the value of free speech. Then they use alternative reasons as a pretext to shut down ''objectionable'' speech. That, in some ways, is more dangerous than a frontal attack.

Even assuming that there are some circumstances in which speech can be legitimately restrained, we have seen that schools have been inclined to dissemble in their justifications for suppressing speech.

It is for that reason, when universities take action to limit free speech, they have a solemn responsibility to be absolutely honest and transparent in why they are doing so—they must, as Oliver Wendell Holmes said, ''turn square corners'' when demanding such accommodations. So far, our Ivy League schools have demonstrated a pattern of suppression that should upset all friends of freedom of speech.

I hope that Dartmouth's new president, Sian Leah Beilock, will have the steel in her spine that is needed to take this responsibility seriously and stand up for free speech when it becomes difficult. Her recent statements are encouraging. But when the chips are down, many university presidents have folded.

Admittedly, one of the most serious questions the country faces is how to achieve racial equality. Does it mean equal opportunity or equal results? Is progress for African-Americans, for instance, held back because of residual racism or because of other aspects of the black experience? Views about achieving racial equality that are uttered in good faith are repressed—even shut down as ''racist''—if they vary from certain orthodoxies.

As a result, the charge of ''racism,'' not unlike McCarthy's frequent cry of ''communism,'' has been drained of much of its meaning. Similarly, debates over issues relating to sex education and sexual identity—issues about which many hold sharply divergent views, sometimes based on religious differences—are ruled unacceptable.

Those repressive forces come from the left side of our political spectrum, but I can think of examples coming from the opposite political pole. For instance, although it is certainly reasonable for parents to argue about the curriculum of public schools, it is intolerant to seek to ban library books on critical race theory, at least at the high school level.

By the same token, efforts to prevent persons such as Linda Sarsour from speaking on college campuses in support of BDS (boycott, divestment and sanctions) directed against Israel are equally intolerant. As a onetime special envoy in the Middle East I regard BDS and Sarsour's views as particularly obnoxious, but I deplore the effort of Jewish groups to prevent her from speaking at universities.

My class at Dartmouth entered in the fall of 1953. The previous spring Dwight D. Eisenhower spoke at commencement. He implicitly attacked Joe McCarthy and McCarthyism, admonishing students: ''Don't join the book burners.''

Consider the context of Eisenhower's speech: we were in the midst of a Cold War with the Soviet Union, over 50,000 American men had been killed in Korea, and there were indeed prominent pro-communist traitors in our own government, as well as in allied governments. Nevertheless, speaking extemporaneously, Eisenhower courageously said, ''How will we defeat communism unless we know what it is and what it teaches and why does it have such an appeal to men, why are so many people swearing allegiance to it? . . . And we have got to fight it with something better, not try to conceal the thinking of our own people.''

And this is the part I love: ''They are part of America. And even if they think ideas that are contrary to ours, their right to say them, their right to record them, and their right to have them at places where they are accessible to others is unquestioned, or it isn't America.''

Because McCarthy was a Republican, it was important that Republicans—most notably Sen. Margaret Chase Smith and then Eisenhower himself—were the ones to speak out and put an end to his reign of intolerance. I hope you Dartmouth students—on both sides of the political spectrum—will stand up for freedom of expression. It is not a partisan issue. It is, as I have tried to explain, fundamental to American democracy.

To be sure, you may have to draw upon ''the granite of New Hampshire, in your muscles and your brains'' to withstand the immense pressure to bow to conformity. But I expect nothing less.

TRIBUTE TO PATRICK J. LEAHY

Mr. MCCONNELL. Madam President, on another matter, we begin to reach